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THE SCOPE AND PURPOSE OF SOCIOLOGICAL JURISPRUDENCE.

[*Concluded.*]

III.

SOCIOLOGICAL JURISPRUDENCE.

SOCIOLOGICAL Jurisprudence is still formative. In diversity of view the sociological jurists but reflect the differences that exist among sociologists. This is no more a ground for denying that there is a sociological school or denying that there is a sociological method in jurisprudence, than the differences among philosophical jurists are ground for denying that there is a philosophical method.

In common with sociology, sociological jurisprudence has its origin in the positivist philosophers in the sense that each subject has a continuous development from Comte's positive philosophy. But both have long got beyond this and are now wholly independent of it. Nevertheless, there are those who appear to insist that sociological jurisprudence must be identified with a philosophical jurisprudence of the positivist type.[1] Others, also, because sociological thought went through an anthropological-ethnological stage, both in the social sciences generally and in jurisprudence, assume that sociological jurisprudence can mean only

[1] Berolzheimer, System der Rechts und Wirthschaftsphilosophie, II, 385–386; Charmont, La renaissance du droit naturel, 122–127.

a science of law based on anthropology and ethnology.[2] In other words, some insist it must stand for a mechanical interpretation that regards law as the product of an inexorable mechanism of social forces. Others insist that it must stand for an ethnological interpretation; for a science of law developed from comparative study of primitive institutions or for a generalization from the jural materials gathered by a purely descriptive social science.[3] Today, such views are held chiefly by the critics of sociological jurisprudence. But they have a certain warrant in an unhappy tendency in the earlier stages of the development of the new school to insist exclusively upon some one phase of social science or some one mode of investigation or some one interpretation. It is to be remembered, however, that all the methods of jurisprudence have suffered from a like tendency; that extreme assertions of an imperative theory at one time brought analytical jurisprudence into disfavor, that historical jurisprudence is now under a cloud because it was so long identified with Savigny's views as to law-making, and that philosophical jurisprudence has still to recover in some countries the ground it lost when it became identified with the metaphysical method of the last century. Sociological jurisprudence did not find itself at once, and some assert it has not yet done so.[4] It has gone through several stages, of which some have

[2] Del Vecchio, I presupposti filosofici della nozione del diritto, 86–93.

[3] "What we call sociology is often no more than a mass of facts of experience which logically ought to belong to the science of universal comparative law, and, to speak more broadly, to the science of law from which they have only been excluded because of the over-narrow conception which has obtained heretofore. Institutions and phenomena of social life which, considered in a certain stage of evolution or under some better-known aspect, are indubitably of a juridical nature, are cast out of the official bounds of juridical science when they are presented in a more primitive form, among less civilized peoples or even among peoples of a different civilization. For example, a work upon the parental régime and the patrimonial régime of the Papuans or of the Bogos, and perhaps even of the Aztecs or of the Coreans, would have few chances of being taken into consideration by jurists, who do not like to go beyond the limits of the traditional culture. But such a work would easily find asylum in the often chaotic mass of facts and conjectures which we call sociology, which, in its defective systematization bears the mark of the imperfections of contemporary culture. The truth is that the only sociology which has a *raison d'être* is a treatise of the rules of method, common to different sciences, to be observed in the study of human facts." Del Vecchio, Sull' idea di una scienza del diritto universale comparato, 11 (1909).

[4] "We employ the expression 'science of law' as synonymous with juridical sociology. It is a science that has yet to be constituted." Rolin, Prolégomènes à la science du droit, 1.

been outgrown thoroughly, while others are still represented in current discussion. These stages must be distinguished and borne in mind if we are to understand either sociological jurisprudence or its critics. It is true that they can be distinguished only in a broad and general way. As in so many other cases where periods are to be set off, the lines must be drawn somewhat arbitrarily here and there, for the stages merge or overlap, and the whole course of development has not proceeded for half a century. But, with this reservation, there seems good warrant for holding that sociological jurisprudence has gone through three stages and has entered upon a fourth. These may be called (1) the mechanical stage, (2) the biological stage, (3) the psychological stage, and (4) the stage of unification.[5]

1. The Positivists — The Mechanical Stage.[6]

It has been said that Comte's sociology was a "technology of social machinery, a handbook of the soulless forces which turned the wheels of the ages." [7] Comte was a mathematician. Moreover, in the first half of the nineteenth century the central point in scientific thinking was the mechanism of the physical universe. Men's minds were fascinated by the idea of laws, mathematically demonstrable, which control the operations of nature, and for a season they took, as it were, a mathematical view; they sought to find mathematical or mechanical laws according to which all things came into existence and were governed in their course of existence. This type of thinking is to be seen in the first positive philosophies of law and in the first stage of sociological jurisprudence.[8] It was the obvious result of the mental bent of the founder of sociology. But in jurisprudence it was especially congenial and so lingered

[5] So far as they have to do with general sociology, the classification and the discussion following are based upon Small, The Meaning of Social Science, 71–85.

[6] Berolzheimer, System der Rechts und Wirthschaftsphilosophie, II, § 44; Gumplowicz, Philosophisches Staatsrecht (1877); Allgemeines Staatsrecht (3d edition of the former) (1907); Geschichte der Staatstheorien (1905) (see especially the appendix, Zur Kritik der juristischen Methode im Staatsrecht); Stein, Die soziale Frage im Lichte der Philosophie (1897, 2 ed., 1903) (especially the chapter, Ursprung und sozialer Charakter des Rechts).

[7] Small, The Meaning of Social Science, 74.

[8] A good account of this may be found in Carle, La vita del diritto, 2 ed., § 229. Compare Korkunov, General Theory of Law (transl. by Hastings) 265 *et seq.*

longer than elsewhere because of the influence of the historical school. Like the historical jurist, the first type of sociologist looked at law in its evolution, in its successive changes, and sought to relate these changes to the changes undergone by society itself.[9] The historical jurist found metaphysical laws behind them. The positivist substituted physical laws. The result was the same. Each eliminated the old idea of right and with it all idealism in jurisprudence or legislation.[10]

A later form of what is essentially the same type of juristic sociology is to be seen in attempts to state all jural experience solely in terms of economics. The economic interpretation has been spoken of heretofore. In combination with positivist ideas, it has given rise to a sort of fatalist natural law. The old natural law called for search for an eternal body of principles to which the positive law must be made to conform. This new natural law calls for search for a body of rules governing legal development to which law must and will conform, do what we may. Whatever exists in law exists because of the operation of these rules. The operation of these same rules will change it and will change it in accordance with fixed and definite rules in every way comparable to those which determine the events of nature. The doctrine has been set forth in its most extreme form in America:

"Law is the resultant of the conflict of forces which arises from the struggle for existence among men. Ultimately these forces become fused under the necessity of obtaining expression through a single mouthpiece, and that fusion, effected under this pressure, we call the will of the sovereign. It is, however, the will of a sovereign precisely in the sense that the earth's orbit, which is a resultant of the conflict between centrifugal and centripetal force, is the will of a sovereign. *Both the law and the orbit are necessities*, and the one and the other have a like relation to an abstract idea of right and justice." [11]

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[9] On this relation of the positivists to the historical jurists, see Charmont, La renaissance du droit naturel, 117.

[10] *Id.* 122. A similar coöperation with the type of analytical jurist who eliminates juridical idealism through insistence upon the imperative character of law and hence upon the sovereign will as the ultimate, self-sufficient source of legal rules, would have been possible had the two schools been brought in contact. Indeed a combination of positivism and of social utilitarianism may be seen in Vander Eycken, Méthode de l'interpretation juridique (1907).

[11] Brooks Adams, in Centralization and the Law, 23 (1906).

Again:

"Various forces being always in conflict, they become fused in the effort to obtain expression, and their fusion creates a *corpus juris, the corpus inclining in the direction of the predominant force in the precise degree in which it predominates.* . . .

"The sovereign being only a vent or mouthpiece, the form the mouthpiece takes, or the name given it, is immaterial. Whether the social resultant expresses itself through a prophet like Moses, or an emperor like Cæsar, or a moneyed oligarchy like the modern British Parliament, the result is the same. The dominant class, whether it be priests or usurers or soldiers or bankers, will shape the law to favor themselves, and that code will most nearly approach the ideal of justice of each particular age which favors most perfectly the dominant class." [12]

This is precisely the position of the mechanical period of sociology, a period long outgrown in the social sciences other than jurisprudence.[13] Professor Small says aptly that

"The sociological fashion set by Spencer was to treat social forces as though they were mills of the gods which men could at most learn to describe, but which they might not presume to organize and control." [14]

Thus in one of his earlier writings Gumplowicz, in discussing the aristocratic order, argues that criticism is futile.

"Sociology," he says, "must refrain from all such criticism of nature. For sociology, only the facts and their conformity to laws have an interest." His reason is that "*Social phenomena follow necessarily from the nature of men* and from the nature of their relationships." [15]

In this very spirit, the jurist I have been quoting says:

"With the moral or political aspects of this controversy, we, as lawyers, have nothing to do, for professionally the function of the lawyer is to accept that which exists and deal with exigencies as they arise. We are only concerned with the effect of the struggle upon the *corpus juris*,

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[12] *Id.* 63–64.

[13] See Small, General Sociology, 80–87.

[14] *Id.* 84. Again: "While the Spencerian influence was uppermost, the tendency was to regard social progress as a sort of mechanically determined redistribution of energy which thought could neither accelerate nor retard." *Id.* 82.

[15] Grundriss der Sociologie, 133 (1885). I have used Professor Small's translation, in General Sociology, 86.

since the law, being the resultant of the forces in conflict, must ultimately be directed in the direction of the stronger, and be used to crown the victor." [16]

All that has been said as to the practical effects of the analytical and the historical methods, when made, as they usually come to be, the basis of a theory of legislation, applies with even greater force to this type of sociological jurisprudence.[17] Law is an inevitable resultant; in making or finding it, legislator or judge is merely bringing about "conformity to the *de facto* wishes of the dominant forces of the community." [18] The eighteenth-century doctrine, although it put the *fundamenta* beyond reach of change, at least moved us to scan the details of the superstructure and to endeavor to make each part conform to the fixed ideal plan. It admitted that legislator and jurist had each a function. The historical school denied any real function to the former. The positivist denies it to the latter. To the doctrine of legislative futility, which he accepts, though for other reasons, he adds a doctrine of juristic futility. Hence the achievements of this school have been purely negative. They have helped to clear away, but they have built nothing. For the "declaration of the dominant social organism by which a legal standard is created or imposed" [19] may or may not establish itself in the legal system. The Roman law of juristic acts has not become the law of the world nor is the Anglo-American law of torts becoming a law of the world because either has behind it a dominant social force. Much that has such a force behind it leaves but a faint mark upon the law. A theory that leaves out of account the quest of jurists and judges for an ideal of an absolute, eternal justice, well or ill conceived, to which they seek to make the rules enforced in tribunals approximate so far as possible, and juris-

[16] Centralization and the Law, 132–133.

[17] The mechanical sociology has been so thoroughly criticized from so many quarters, and by none more effectively than by sociologists themselves, that even its persistence in a type of recent juristic thinking cannot justify giving much space to what is no more than a belated phase. But a reference to James, The Will to Believe, 216 (Great Men and their Environment), may be worth while.

[18] Holmes, J., in Lochner *v.* New York, 198 U. S. 45, 75, 25 Sup. Ct. 539, 547 (1905). Here, however, the Spencerian jurisprudence is invoked against the traditional historical jurisprudence. The notion that social forces working through legislation cannot make law is met by the proposition that they can and will make the law, the means of expression being wholly immaterial, and that it is not for the lawyer to interfere.

[19] Gareis so defines legislation. Science of Law (transl. by Kocourek), 80.

tic tradition, that is traditional principles and traditional modes of reasoning therefrom, ignores the chief influences in determining the bulk of the rules actually in force in any legal system at any given time. No doubt the ideal of justice is affected by training and associations which reflect class-interest. On the other hand the conscious endeavor to adhere to the ideal is a powerful check on the operation of class-interest.[20] Self-interest of the dominant class in the community for the time being affects chiefly the imperative element in legal systems, that is, legislation. Perhaps for that very reason legislation, as a means of making law, has played the least part in legal development.[21]

If, however, the earlier type of sociological jurist on one side brought us by another path to the position of the futility of effort to which the historical school had led us, on another side he performed a service which Berolzheimer rightly pronounces invaluable.[22] This service was twofold: (1) in displacing the individualist starting-point and the atomistic standpoint of nineteenth-century jurisprudence by insisting upon the importance of the group, of the class, of "the compact plurality," [23] and (2) in compelling us to relate the law more critically to other social phenomena. In urging that the form of social organization was not an arbitrary and artificial fact, that society was not a mere human invention, that the development of society took place according to fixed principles analogous to those which govern the physical universe, and hence that laws and legal institutions develop in accordance with similar principles, they drove the other schools to seek a broader foundation and furnished much of the impetus which produced the social-philosophical school.

2. The Biological Stage.[24]

In the last third of the nineteenth century many jurists began to look at all things literally or figuratively in terms of biology.

[20] See particularly Professor Burdick's demonstration of this in his paper, Is Law the Expression of Class Selfishness?, 25 Harv. L. Rev. 349.

[21] An excellent critique of the theory of law as the expression of the interest of the dominant class may be found in Tanon, L'évolution du droit et la conscience sociale, 3 ed., 180–189.

[22] System der Rechts und Wirthschaftsphilosophie, II, 384.

[23] Berolzheimer, *loc. cit.*

[24] Berolzheimer, System der Rechts und Wirthschaftsphilosophie, II, §§ 47, 51;

The epoch-making work of Darwin had made evolution the central idea in scientific thought. From the natural sciences the conception invaded and remade philology, was applied to the history of social and religious institutions, and ultimately came into jurisprudence. A natural science of the state and a natural science of the law succeeded the attempts to work out a physical science of the state. A biological sociology succeeded the mechanical sociology. For a time, indeed, the two overlapped. This is true of Spencer's sociology, which, as has been pointed out by many critics, was not at all evolutionist.[25] It is true also of the first attempts at sociological jurisprudence from the biological standpoint. Jurists were attracted by the conception of natural selection. The struggle for existence seemed to afford a fundamental principle for jurisprudence which confirmed the beliefs they had formed under the influence of the historical school or of the positivists. Accordingly they brought us to the same position to which the latter had led us previously, but by this route: The end of law is to give free play in an orderly and regulated manner to the elimination of the unfit, to further selection by a well-ordered social struggle for existence. Revolt of the social conscience against such theories has been an important factor in the juristic movement for the socialization of law.[26]

In its biological stage, sociological jurisprudence exhibits four types: (1) a mechanical type, which has just been considered, (2) an ethnological type, (3) a philosophical type, and (4) an organismic type. The three last deserve special consideration.

Attempts to develop and apply theories of evolution led for a time to exaggerated reliance upon primitive law. A school of jurists

Kuhlenbeck, Natürliche Grundlagen des Rechts; Matzat, Philosophie der Anpassung mit besonderer Berücksichtigung des Rechtes und des Staates; Ruppin, Darwinismus und Sozialwissenschaft; Hasse, Natur und Gesellschaft; Michaelis, Prinzipien der natürlichen und sozialen Entwickelungsgeschichte des Menschen; Coker, Organismic Theories of the State, chaps. 3, 4; Tourtoulon, Principes philosophiques de l'histoire du droit, 80–173; Letourneau, Évolution juridique; D'Aguanno, La genesi e l'evoluzione del diritto civile; Cogliolo, Saggi sopra l'evoluzione del diritto privato; Cogliolo, La teoria dell' evoluzione darwinista nel diritto privato.

[25] "While Spencer was popularizing the notion of evolution, he was also circulating a theory of society which was in effect as fatalistic as the hyper-Calvinistic dogma of foreordination. . . . Society, in Spencer's version, was simply a gigantic organism endowed with an unalterable amount of energy, and this energy would inexorably redistribute itself according to laws lodged in itself." Small, The Meaning of Social Science, 82.

[26] See especially Tanon, L'évolution du droit et la conscience sociale, 116–166.

arose who expected study of the social and legal institutions of the most primitive peoples to reveal the fundamental data of jurisprudence and the fundamental laws of jural development. They conceived that they could find in primitive man all the materials which were needed to explain the social man in general, and hence in primitive social institutions the materials needed to explain the legal systems of today. I have referred elsewhere to the writings of this school and to the good work its adherents did in broadening the historical and philosophical schools.[27] Here it is enough to say that their influence gave rise on the one hand to attempts to interpret jurisprudence and legal history in terms of race, considered in another connection heretofore,[28] and on the other hand to an opinion that the true method of jurisprudence was that which sociologists have called the demographic; that legal science was to be founded upon generalization from a descriptive sociology.[29] The kernel of truth in each case is that juristic study in the past, both historical and philosophical, had been too restricted in its materials.[30] Beyond this, ethnological and demographic methods are no more the chief tools of the sociological jurists than they have proved to be in the case of the general sociologists. As one of the latter says:

"It is a grotesque hallucination that men in stages of arrested development — men about whom, moreover, all available evidence is woefully meager — furnish the only clues to human nature." [31]

It is no less grotesque to suppose that the social institutions of such men furnish the only or even the chief clues to the principles of legal systems. Yet the reaction recently from the exaggerated

[27] 24 HARV. L. REV. 614–617.

[28] 25 HARV. L. REV. 165. See also Tourtoulon, Les principes philosophiques de l'histoire du droit, 85–86.

[29] "There are determinate laws according to which all organic structures, which are formed over men in the human race, are developed, and these laws may be disclosed by comparison of the corresponding periods of development of all the generic organisms upon the earth, living and past. To determine these laws is the next task of the political and legal science of the future. For the determination of these laws, a mighty mass of material lies before us which needs only collection and collation in order to produce the most fruitful ideas for the jurisprudence of the future." Post, Der Ursprung des Rechts, 7 (1876).

[30] See Del Vecchio, Sull' idea di una scienza del diritto universale comparato, 11; Kohler, Rechtsphilosophie und Universalrechtsgeschichte, §§ 8, 11.

[31] Small, General Sociology, 100.

claims once made for the so-called ethnological jurisprudence may well have gone too far. Thus it has been said:

" While equally with the individual each race depends on its heredity and bears the consequences thereof, the law is no more individual than any other social fact. It is the product of the group. The thought which emanates from the group is freed from physiological influence, since it emanates from other thoughts and not from an organic body. Consequently race has no influence upon institutions. White, yellow, or black of the same degree of development, placed in the same conditions, would reproduce exactly the same law, while remaining in their private psychology white, yellow, and black." [32]

As Tourtoulon says of this, it is true that individual characters combine in the group, but they are not lost there. The argument that seeks to prove that race has nothing to do with law would demonstrate that the laws enacted by an assembly of drunk men would carry no trace of the merely personal drunkenness of each individual.[33] More thorough study is required. But enough has been done at one point to yield valuable results. The problem of the relation of law and mixed races is becoming acute in some parts of the world, and the effect upon the law of a mixed race, whose members are moved by diverse ideals and are incapable of concerted action toward a common goal, is becoming manifest.[34] Comparative study of primitive law is showing also that the relativity of jural principles has been much overrated since the downfall of the law-of-nature school. After a comparison of the laws of Hammurabi (B. C. 2285–2242) with the Salic Law (A. D. 466–511), Fehr says:

" Over and above race and nation there must be conditions of general validity governing the production of law. The fundamental forms of spiritual social life, from which the law springs, are more independent of race and nation than the historical school conceded. The likeness of law in cases of the most striking unlikeness of race can only be explained by a common human basis." [35]

The philosophical type of bio-sociological theory of law proceeds in one form or another upon the idea of selection. In one form, the development of law is conceived as resulting from a conflict or

[32] Tourtoulon, Les principes philosophiques de l'histoire du droit, 85, stating Durkheim's view.

[33] *Id.* 86. [34] *Id.* 125. [35] Hammurapi und das Salisches Recht, 136.

competition of legal institutions or of legal doctrines, from which those emerge which are most adapted to further the progress of the race. Accordingly law is held to be an aggregate of the means by which each group protects itself against hindrances to its continuance and to its progress found in the actions of certain of its members or in the hostility of other groups.[36] A complete legal system is worked out in this way after a fashion that reminds one forcibly of the method of the metaphysical jurists. Thus with Richard the starting-point in every case is prohibitive intervention designed to obviate conflict. For example, society forbids its members to possess themselves by force or fraud of a good already possessed; it punishes theft, robbery, and plundering and so creates ownership. In the same way contract is developed by opposition from measures taken to repress deceit, fraud, abuse of trust and the like, the validity of an agreement concluded honestly and fairly being deduced ultimately by way of consequence.[37] This type of sociological jurisprudence is quite as barren as the metaphysical jurisprudence which it imitates. Indeed, that sociological jurisprudence should take such a turn at all is but one more illustration of the influence of propinquity upon juristic thought. We must remember that the metaphysical school was still alive and not without vigor in France at the very end of the nineteenth century.

In another form of the philosophical type under consideration race-conflict or conflict of race ideas is made the basis. Enough has been said of ethnological interpretations heretofore. In still another form, which has had no little currency, class-conflict is taken as the basis, not, however, as in the mechanical sociology, by conceiving of class-conflict as fixing mechanically the whole

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[36] Richard, Origines de l'idée du droit, 5. Compare: "To my mind sociology is the study of adaptations of men (these are principally mental adaptations) to life in society. Law is one of these adaptations; the one which has for its end to combat by constraint the effects or the causes of certain defaults of adaptation which are considered intolerable. Juridical sociology is, then, the *study of the mental adaptations of men living in society, which adaptations are destined to struggle by means of constraint against certain inadaptations of the same men.* Considered from this point of view, the science of law appears a chapter of the natural history of man." Rolin, Prolégomènes à la science du droit, 4–5. The italics are in the original.

Korkunov gives us the best version of this type of theory: "Legal development as a whole is a struggle of old law, unconsciously established, against new law consciously adopted." General Theory of Law (transl. by Hastings) 165.

[37] Richard, Origines de l'idée du droit, 54–55.

content of legal systems, but by conceiving of it as resulting in a process of selection by which, as it were, the unfit institution and the unfit rule are weeded out or by which the race or nation falls behind or is eliminated which does not develop and preserve the fit institution and the fit rule.[38] The idea of selection through class-conflict has been urged chiefly by Vaccaro.[39] In his view, law grows out of the struggle of social classes for supremacy. He does not deduce therefrom, however, that the sole function of law is to express the will of the dominant class for the time being — "to crown the victor." [40] In quite another spirit from those who adhere to the imperative form of the economic interpretation,[41] he says that its function is to adapt men to the social environment by determining the conditions of their coexistence.[42] This is simply a sociological version of an idea which is to be found frequently in the writings of the metaphysical and historical jurists.[43] The most important difference is in the insistence upon relativity. Thus, Vaccaro says:

"The conditions of coexistence imposed by law are not those that ought to be in order to assure the greatest possible prosperity of all the associates, but *those which result from the action and reaction of men as they are at a given historical moment.*" [44]

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[38] "The institutions of civilized peoples have been considered as the product of a selection because societies which have not disciplined or organized themselves, which have practiced theft, violence, assassination, have been eliminated." Charmont, La renaissance du droit naturel, 119. It is noteworthy that Montesquieu had an idea not unlike this. See his description of the Troglodytes, who perished utterly because they wilfully violated contracts. Lettres Persanes, Lettre XIV *et seq.*

[39] Le basi del diritto e dello stato (1893), translated by Gaure as Les bases sociologiques du droit et de l'état (1898). For an appreciation and critique, see Gumplowicz, Geschichte der Staatstheorien, § 137.

[40] Brooks Adams in Centralization and the Law, 132.

[41] Here again the influence of propinquity upon juristic thought is manifest. Brooks Adams wrote in a country where analytical jurisprudence was one of the two prevailing methods. His lectures are full of attacks upon the orthodox analytical position. Yet his sociological theory is essentially analytical. Vaccaro wrote in a country where natural law was far from dead and the analytical theory almost unheard of.

[42] Les bases sociologiques du droit et de l'état, 452.

[43] *E. g.*: — "The sum of the conditions of social co-existence with regard to the activity of the community and of individuals." Pulszky, Theory of Law and Civil Society, 312 (1888). "The power of coercion . . . necessary for the harmonious co-existence of the individual with the whole." Lioy, Philosophy of Right with Special Reference to the Principles and Development of Law (transl. by Hastie), II, 122 (1891).

[44] Les bases sociologiques du droit et de l'état, 452. The point will be more clear if

Perhaps enough has been said to indicate that this idea of relativity, valuable as it is in enabling us to combat absolute ideas of justice and hard and fast schemes of supposed fundamental jural principles, may itself be carried too far. No action and reaction of men as they have been at any given moment since republican Rome will explain the long history of the doctrine of impossible and illegal conditions precedent in testaments; no theory of the power of a creditor class will explain the *beneficium excussionis*, its long and involved history in the modern world, and its tendency to disappear in favor of creditors at the very time when both law and public opinion are becoming more and more tender of debtors. But such matters are of more importance in legal systems and have more significance for jurisprudence than the short-lived penal legislation from which most of the data for the theories of class-struggle as the determining factor in legal history have been drawn. Such theories, however, have had an important consequence in directing attention to the unequal operation of doctrines derived by the nineteenth-century method of abstraction, when applied to a society in which industrial progress has resulted in sharply differentiated classes. A group of socialist-jurists has worked upon this matter with zeal and effect.[45]

Foremost among those who have examined actual legal systems with a view of ascertaining the relation of existing rules and doctrines to the interests of the industrial class is Anton Menger.[46] The law of modern Continental Europe was reformulated in codes which, except in the case of the new code of the German Empire, for the most part antedate modern industrial conditions. Hence in this juristic new start the laborer was not taken into account at all.[47]

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we compare this with Trendelenburg's formula: "The sum of those *universal* determinations of action through which it happens that the ethical whole and its parts may be preserved and further developed." Naturrecht, § 46.

[45] See Berolzheimer, System der Rechts und Wirthschaftsphilosophie, § 40; Charmont, Le droit et l'esprit démocratique, chap. 2 (la socialisation du droit); Gumplowicz, Die soziologische Staatsidee, 115 *et seq.*; Stein, Die soziale Frage im Lichte der Philosophie, 2 ed., 336 *et seq.*

[46] Das Recht auf den vollen Arbeitsertrag (1886, 3 ed., 1904); Das bürgerliche Recht und die besitzlosen Klassen (1889, 3 ed., 1904); Ueber die sozialen Aufgaben der Rechtswissenschaft (1895, 2 ed., 1905).

[47] Compare Glasson's observations upon the French code: Le code civil et la question ouvrière, 6. Also Tissier, Le code civil et les classes ouvrières, Livre du centennaire du code civil, 71–94.

Menger's comparisons of the interests which the law secures with those which it leaves unsecured showed that a situation had arisen for which the codes had made no provision. Indeed from the standpoint of class-struggle, it is said that the working class was left wholly out of the reckoning in the drawing up of the codes. This can hardly be maintained. The French code, which served as a model, was based chiefly upon the juristic writing of the century before and represents the law of a period when there was no such class to attract attention. But it is true of the codes of Continental Europe, as of our Anglo-American common law, that their abstractions, proceeding upon a theoretical equality, do not fit at all points a society divided into classes by conditions of industry. Much of what has been written in Europe from this standpoint might have been written by American social workers. Thus:

"Insanitary housing, exorbitant rent, payment in advance, subjection to shop regulations, fixing of the method and the duration of work, fines, the sweating system,—all is covered by the fiction of liberty of contract. Meanwhile in fact liberty is suppressed." [48]

In compelling study of the relation of law to social classes and so making for a socialization of the law, the group of socialist jurists has done a considerable service.

The organismic type of bio-sociological theory of law is in reality a philosophical theory couched in bio-sociological terminology. Thus Fouillé says:

"The laws of natural history are valid for nations, for at the same time that a nation is a work of voluntary consent it is also a natural organism." [49]

Hence, he holds, the same laws of natural history obtain for national institutions, including legal systems. In application, however, his method is that of the metaphysical jurists, and his formula of law —

"The concrete and complete law, at the same time ideal and real, becomes *the maximum of liberty, equal for all individuals*, which is compatible with the maximum of liberty, of force and of interest for the social organism " [50] —

[48] Andler, preface to the French version of Menger's Recht auf den vollen Arbeitsertrag (Droit au product integral du travail).

[49] L'idée moderne du droit, 6 ed., 402 (1909).

[50] *Id.* 394.

is but a familiar formula of the metaphysical school superficially socialized.

So Kuhlenbeck's essay at a "legal-philosophical and critical estimation of the theory of descent" [51] is to be classed with philosophical rather than with sociological systems.

Now that "the heroic period of socio-biology" in jurisprudence has passed [52] and this phase of sociological jurisprudence comes to be reviewed, the liberalizing effect of the idea of evolution, as soon as it was freed from the hard and fast mechanical systems of those who first applied it, and the loosening effect of biological terminology upon the absolute ideas which the historical school had left unshaken and upon some which that school had set up of its own motion, must be conceded to have marked a step forward. Beyond this, little has been achieved. Biological facts are indirectly and remotely among the causes of law. But they are not the proximate causes which the jurist must investigate. Justice, in the sense of the end of legal administration, public order, the jural order, or *Friedensordnung* as the Germans put it, may be regarded as a sort of directing and debrutalizing of the process of selection, a mode of requiring the struggle for existence to be carried out according to rule. Criminal law particularly may be looked upon as performing a function of selection. Yet when we have looked at these institutions in this way we have not been looking at those features which are significant for sociology or for jurisprudence. Tourtoulon says rightly:

"The idea of selection does not suffice to constitute the basis, theoretical or practical, of any part of the law." [53]

3. The Psychological Stage.[54]

Three influences combined to turn the attention of sociological jurists toward psychology. They may be summed up in three

[51] Natürliche Grundlagen des Rechts und der Politik. Ein Beitrag zur rechtsphilosophischen und kritischen Würdigung der sogenanten Deszendenztheorie (1905).

[52] These words are Tourtoulon's. Les principes philosophiques de l'histoire du droit, 82.

[53] *Id.* 166.

[54] Berolzheimer, System der Rechts und Wirthschaftsphilosophie, II, § 49; Tarde, Les lois de l'imitation, chap. 7, § 4, Parsons' transl. 310–322 (1890, 2 ed. 1895); Tarde,

names, Gierke, Ward, and Tarde. More precisely they were (1) study of group personality and group will, leading to a psychological movement in legal and political philosophy, (2) the complete change in method in the social sciences which resulted from Ward's thesis that "psychic forces are as real and natural as physical forces . . . and that they are the true causes of all social phenomena," [55] and (3) Tarde's demonstration of the extent to which imitation is a factor in the development of legal institutions and his working out of the psychological or sociological laws of imitation.

As a Germanist, Gierke [56] was at outs with the orthodox historical school, which was then wholly Romanist. To this fortunate circumstance we may owe it, in part at least, that while his method is primarily and truly historical, he had broken with the metaphysics of the historical school as well as with its learned tradition. Hence, in contrast with the method, then prevalent, of beginning all juristic discussion with the individual will, he struck the sociological note in his first sentence:

"What man is, he owes to the union of man with man. The possibility of creating associations, which not only enhance the power of those who live contemporaneously but above all, through their permanence, surviving the personality of the individual, bind the past of the race to those to come, gives us the possibility of the development of history." [57]

His theory of associations thus became as strong an attack upon the individualist jurisprudence of the nineteenth century upon one side as Jhering's theory of interests was upon another. That the group or association has a real personality, that in fact and not merely in legal fiction it is more than an aggregation of individuals, that there is a group will, which is something real, apart from the wills of the associated individuals, that the law does not create but merely recognizes personality, exactly as in the case of the human being, and does not create but merely gives legal effect

Les transformations du droit (1894, 6 ed. 1909); Tourtoulon, Les principes philosophiques de l'histoire du droit, 174–331 (1908); Tanon, L'Évolution du droit et la conscience sociale, 3 ed., 143–176 (1911); Vanni, Lezioni di filosofia del diritto, 3 ed., 29 *et seq.* (1908, 1 ed. 1901).

[55] Small, The Meaning of Social Science, 84; Ward, Dynamic Sociology, I, 457 *et seq.*

[56] Das deutsche Genossenschaftsrecht, vol. I, 1868, vol. II, 1873, vol. III, 1881.

[57] *Id.* I, 1.

to the powers of action of the group or association, again exactly as in the case of the human being, — these ideas of Gierke's not only revolutionized theories of the juristic person but they compelled new theories of the greatest of all these groups, namely, the state.[58] Accordingly the group will became no less important — indeed in a sense more important — than the individual will; group motives had to be sought and explained no less than individual motives. As Wundt put it, the state is not necessary to law. What is necessary is an association or society which is capable of producing a collective will because of correspondence of ideas and interests.[59] The significance of this proposition for the theory of International Law is manifest.

One effect of the shifting of emphasis in the philosophy of law from individual will to group will, and so from individual psychology to group psychology, was to give prominence to the idea of relativity, which, as we have seen, other modes of juristic thought were fostering at the same time. Wundt, in a brief sketch of a philosophy of law, lays especial stress upon this. The development of law, he says, is a process of the psychology of peoples.[60] Hence, like all psychical creations, law has been and will forever continue to be in a process of becoming. He adds:

"Thus we see that law is as variable as man himself; and the attempt to include it in an abstract and absolutely valid system has about as much chance of success as the attempt to introduce an universal language." [61]

Another effect was to give a social-psychological turn to theories of legal obligation, or, in other words, to produce social psychological theories of sanction. Thus Jellinek, who defines society as the "aggregate of the psychological relations between men which are manifest in the external world," [62] begins with the analytical view which characterizes all recent German writing. The essential marks of rules of law, he says, are three:

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[58] Gierke, Die Grundbegriffe des Staatsrechts und die neuesten Staatstheorien, Zeitschrift für die gesamte Staatswissenschaft, XXX, 304. See also his Die Genossenschaftstheorie und die deutsche Rechtssprechung (1887), particularly pp. 10 *et seq.*

[59] Logik, II², 2 ed., 543 (1895).

[60] *Id.* 533.

[61] Ethics (transl. by Titchener and others), III, 161 (1892).

[62] Allgemeine Staatslehre, 2 ed., 89 (1905). This was also in the first edition (1900).

"1. They are norms for the external conduct of men toward one another. 2. They are norms which proceed from a known external authority. 3. They are norms whose binding force is guaranteed by external power." [63]

But what makes a rule law, he says, is that it obtains as a rule, and what makes a right is that the rule which stands behind it obtains in action. This means that its psychological efficiency is guaranteed, that is, that the authority which has prescribed it is so backed by social-psychological power as to be in a position to give effect to the rule, as a motive for action, in spite of counteracting individual motives.[64] Jellinek's doctrine of the relation of state to law and of the nature of sanction is a needed corrective of the imperative ideas which have sprung up in the wake of German legislation. His conception of the social-psychological guarantee, whereby rules are made effective and so are made law, is one of the most important contributions of the psychological movement.[65]

While juristic thought was developing a psychological tendency from within, a psychological movement was going on without which was presently to develop this tendency still further and to give it a new direction. In the biological stage, as we have seen, the static conception of the mechanical sociology persisted. The change of front which involved complete abandonment of that conception begins with Ward.[66] As far back as 1883, when Spencer's sociology was in possession of the field, Ward took the position that social forces were essentially psychic.[67] Whereas social science had been content to study the laws by which social progress took place and had believed it possible to do no more than to observe nature realize itself, Ward conceived that nature might realize itself by "action of its conscious parts upon its unconscious

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[63] Jellinek, Allgemeine Staatslehre, 325.

[64] *Id.* 326.

[65] For numerous examples from American law of today of the way in which judge-made as well as statutory rules fail because they have no such guarantee, see my paper, Law in Books and Law in Action, 44 Am. L. Rev. 12.

[66] Dynamic Sociology (1883); Pure Sociology (1903); The Psychic Factors of Civilization (1901); Applied Sociology (1906). For a juristic discussion of Ward, see Gumplowicz, Geschichte der Staatstheorien, §§ 119–120.

[67] Dynamic Sociology, chaps. 5, 7, 9, 11. "The truth comes forth that the social forces are essentially psychic. It is this that has made it imperative that the foundations of sociology be sought in psychology." The Psychic Factors of Civilization, 120.

parts." [68] Hence it is not enough to study and observe: "the attitude of man toward nature should be two-fold: first, that of a student; second, that of a master." [69] We must study and thus come to know the efficient social forces, but we do this not to know beforehand the results of their inexorable working, but to be able ultimately to apply them consciously to social ends.[70] Summarily stated, his doctrine was that sociology rests upon psychology, and not directly upon biology,[71] that we must know not only how non-sentient nature works, but "how mind combines its work with the non-sentient factors of human conditions," [72] and that this part of nature may be harnessed to man's use as so much of physical nature has been so harnessed. Perhaps nothing has done so much to create world-wide dissatisfaction with law and to make problems of law reform acute almost everywhere as the persistence in juristic thinking and judicial decision of nineteenth-century ideas of the futility of effort at a time when the efficacy of effort had become part of the sociological and the political creed.[73]

A more immediate effect upon jurisprudence was produced by the work of Gabriel Tarde (1843–1904).[74] Tarde, a trained lawyer, was *juge d'instruction* for eighteen years, afterwards head of the statistical department of the French ministry of justice, and professor of philosophy in the Collége de France. Besides the works referred to in the note, he wrote a Penal Philosophy, which is translating for the Modern Criminal Science Series. His most important writings have to do with philosophy and sociology. While Ward was showing us that the psychic factors are those of

[68] Small, General Sociology, 86.

[69] Dynamic Sociology, II, 11.

[70] "The most important principle of social dynamics is effort. But its dynamic effect, from the standpoint of pure sociology, is unconscious, unintended, and undesired. The social development that results from it is spontaneous. Applied sociology assumes that effort is consciously and intentionally directed to the improvement of social conditions." Applied Sociology, 13.

[71] The Psychic Factors of Civilization, chap. 18.

[72] Small, General Sociology, 85.

[73] "Every beneficent change in legislation comes from a fresh study of social conditions and of social ends, and from some rejection of obsolete law to make room for a rule which fits the new facts. One can hardly escape from the conclusion that a lawyer who has not studied economics and sociology is very apt to become a public enemy." Professor Henderson in American Journal of Sociology, XI, 847.

[74] For Tarde's writings that bear more immediately upon jurisprudence see *supra*, note 54.

first importance, Tarde was studying these factors and seeking to discover the fundamental principle by which they are governed. This principle, as one of cosmic philosophy, he took to be universal, endless repetition, of which the social form is imitation. Reviewing the development of civilization, the evolution of language, art, law, and institutions, he found that imitation was a constant factor. Accordingly he undertook to find the psychological and sociological laws of imitation.

Tarde was the first sociologist to give us an adequate theory of what is in reality the most significant part of legal systems. To the lay eye, legislation commonly occupies the whole stage. Tarde, as a practical lawyer, knew the importance of doctrinal writing and judicial decision, of the traditional element in law, of the modes of juristic thinking that give continuity to legal systems. Although rules have disappeared, have altered, have sprung up, developed and decayed, and from small beginnings have grown into whole departments of the law since the seventeenth century, our common law has a real unity from the age of Coke to the present. As a mode of thinking, as a mode of reasoning upon legal subjects, it is the same in England, the United States, Canada, and Australia, the same in substance in one century as in the next. In the same way the Roman tradition has continuity and essential identity from the third century to the twentieth, and as that tradition gives form and color to all the new elements in the law of Continental Europe, so with us the common-law tradition has put its mark upon equity, admiralty, and the law merchant, and has been able to fit legislation, fashioned by whatever force, into its own system. Explanation of this toughness of jural tradition is much more worth while than theories of formal law-making.

To sum up, the earlier psychological movement made possible a reconciliation of Jhering's insistence upon conscious law-making and the historical view, Ward gave the deathblow to the static theory of the positivists and Tarde gave us the leading principle by which, subconsciously, the direction of law-making and law-finding is chiefly determined. Not only does social psychology occupy a chief place in recent sociological jurisprudence [75] but modes of

[75] Brugeilles, Le droit et la sociologie, chap. 6; Les phénomènes interpsychologiques (1910).

juristic thought, the world-view [76] of judges and doctrinal writers and the psychology of juridical methods are coming to be the subjects of special study.[77] With us, unhappily, what studies of the sort have been attempted have been the work of laymen. Such a book as Professor Ross' Social Psychology, written by a lawyer with Anglo-American law for its subject, would be worth many volumes of the conventional analytical and historical jurisprudence.

4. The Stage of Unification.[78]

At the very end of the last century sociologists were coming to see that no one of the methods theretofore worked out was the whole of sociology and that none of the solving ideas put forward was equal to the task of unfolding all the social sciences.[79] A few years later, Ward enumerated twelve "leading sociological conceptions or unitary principles," each of which had been "put forward with large claims to being in and of itself the science of sociology." [80] In another place, after repeating this enumeration, he said:

"No single one of these conceptions is to be rejected. All are legitimate parts of the science. . . . All these various lines, together with all others that have been or shall be followed out, may be compared to so many minor streams, all tending in a given direction and converging so as ultimately to unite in one great river that represents the whole science of sociology as it will be finally established." [81]

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[76] I adopt Baldwin's rendering of *Weltanschauung*, Dictionary of Philosophy and Psychology, II, 822.

[77] Wurzel, Das juristische Denken (1904); Bozi, Die Weltanschauung der Jurisprudenz (1907); Les méthodes juridiques (lectures by a number of French professors of law, 1911).

[78] Brugeilles, Le droit et la sociologie (1910); Ward, Contemporary Sociology (1902); Gumplowicz, Geschichte der Staatstheorien, § 122 (1905); Small, General Sociology, 90–97 (1905); Small, The Meaning of Social Science, Lects. I, III, X (1910).

[79] See the papers cited in Small, General Sociology, 90, note 39.

[80] Contemporary Sociology (reprint of three papers published in American Journal of Sociology, vii, 475 *et seq.*, 629 *et seq.*, 749 *et seq.* "Thus designated these unitary principles, forming the basis of so many systems or schools of sociology, were the following: — Sociology as: I, Philanthropy; II, Anthropology; III, Biology (the organic theory); IV, Political Economy; V, The Philosophy of History; VI, The Special Social Sciences; VII, The Description of Social Facts; VIII, Association; IX, The Division of Labor; X, Imitation; XI, Unconscious Social Constraint; XII, The Struggle of Races." Pure Sociology, 13–14 (1903). It is worth noting that all of these except the first and the fifth, in one form or another, have been put forward in the same way in sociological jurisprudence.

[81] Pure Sociology, 14.

Presently it was seen also that not only was it needful to combine the several methods that had been employed in sociology and to unify the science, but that it was equally needful to put the science into relation with the other social sciences; to unify the social sciences by recognizing that they are "merely methodological divisions of societary science in general." [82]

Both of the foregoing conceptions have come into sociological jurisprudence. It is now recognized that each of the directions which sociological jurisprudence has taken has something for the science as a whole and that no one of them must be pursued exclusively and undeviatingly.[83] It has been felt for some time that the entire separation of jurisprudence from the other social sciences, the leaving of it to itself on the one hand and the conviction of its self-sufficiency on the other hand, was not merely unfortunate for the science of law on general considerations, in that it necessitated a narrow and partial view but was in large part to be charged with the backwardness of law in meeting social ends, the tardiness of lawyers in admitting or even perceiving such ends, and the gulf between legal thought and popular thought on matters of social reform.[84] Not a little of the world-wide discontent with our present legal order is due to modes of juristic thought and juridical method which result from want of "team-work" between jurisprudence and the other social sciences.[85] The first movement toward a better relation between these sciences grew out of the political interpretation of jurisprudence and of legal history, for which the historical school stood, especially in England. Jurisprudence and politics were thus brought into coöperation. In the same way the culture interpretation, adhered to by the Neo-Hegelians, has led to a

[82] Small, General Sociology, 91. "Social science cannot be many. It must be one. The next stage of social science must be marked by a drawing together of the parallel or diverging lines of research in which it has been broken up. We must use the knowledge which we have already gained of parts or aspects or details of human experience to construct a more adequate general survey of the whole of human experience." The Meaning of Social Science, 87.

[83] Brugeilles, Le droit et la sociologie, 160 *et seq.*

[84] Tarde, Les Transformations du droit, Introduction.

[85] Ross, Social Psychology, 223–224; Ely, Economic Theory and Labor Legislation, 18; Bruce, Laissez Faire and the Supreme Court of the United States, 20 Green Bag 546. "So far as any direct influence upon our courts is concerned, our modern textbooks upon economics might as well be written in Chinese." Humble, Economics from a Legal Standpoint, 42 Am. L. Rev. 379.

closer relation between jurisprudence and economics, as shown by treatment of the philosophy of law and the philosophy of economics as parts of a larger subject.[86] The unity of the social sciences and the impossibility of a self-centered, self-sufficing science of law are now insisted upon by sociological jurists.[87] But much remains to be done everywhere in this direction,[88] and in America we have yet to make the very beginning, except as we have learned to harness history for the purposes of legal science. For it is not long since a seventeenth-century legal history was as orthodox as an eighteenth-century philosophy of law and nineteenth-century economics are still. Freeman tells of a teacher of law who

"required the candidates for degrees to say that William the Conqueror introduced the feudal system at the great Gemot of Salisbury in 1086."

When the historian protested, the lawyer replied in all sincerity that he was examiner in law, not in history:

"Facts might be found in chronicles, but law was to be found in Blackstone; it was to be found in Blackstone as an infallible source; what Blackstone said, he, as a law-examiner could not dispute." [89]

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[86] Berolzheimer, System der Rechts und Wirthschaftsphilosophie, ii, viii. The very title of Dr. Berolzheimer's book is suggestive. Compare also the title and scope of the Archiv für Rechts und Wirthschaftsphilosophie. In the same spirit, Professor Humble says: "In spite of this indifference and lack of co-operation . . . the subject matter of the two studies [*i. e.* law and economics] is largely common ground." Economics from a Legal Standpoint, 42 Am. L. Rev. 379, 380.

[87] "The error of the classical conception was in looking upon law as a science isolated from the others, self-sufficient, furnishing a certain number of propositions the combination whereof ought to provide for all needs. In reality the law is only a resultant. Its explanation is outside of itself. Its sources must be sought elsewhere." Vander Eycken, Méthode positive de l'interprétation, 112 (1907). "Nothing is more fallacious than to believe that one may give an account of the law by means of the law itself." Roguin, Le règle de droit, 8 (1905). See also Bosanquet, Philosophical Theory of the State, 36 *et seq.* (1899).

[88] Kantorowicz, Rechtswissenschaft und Soziologie, 8 (1911).

[89] Freeman, Methods of Historical Study, 73–74. Compare with the foregoing: "The report of the commission . . . is based upon a most voluminous array of statistical tables, extracts from the works of philosophical writers and the industrial laws of many countries, all of which are designed to show that our own system of dealing with industrial accidents is economically, morally, and legally unsound. Under our form of government, however, courts must regard all economic, philosophical, and moral theories, attractive and desirable though they may be, as subordinate to the primary question whether they can be molded into statutes without infringing upon the letter or spirit of our written constitutions." Ives *v.* South Buffalo R. Co., 201 N. Y. 271, 287, 94 N. E. 431, 437 (1911). Of course, economic, moral, and philosophical

Holmes and Bigelow and Thayer and Ames and Maitland have made us wiser with respect to law and history. But it is still good form for the lawyer to look upon our eighteenth-century Bills of Rights as authoritative text-books of politics,[90] of ethics,[91] and of economics.[92]

The Present Status of Sociological Jurisprudence.[93]

The main problem to which sociological jurists are addressing themselves today is to enable and to compel law-making, and also

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theories of today could have no more bearing on the reading of the text than historical study of today, in the mind of Freeman's teacher, could have upon the legal dogma as to what was legal history!

[90] People *v.* Coler, 166 N. Y. 1, 14, 59 N. E. 716, 720 (1901); Low *v.* Rees Printing Co., 41 Neb. 127, 135, 59 N. W. 362, 364 (1894); State *ex rel.* Zillmer *v.* Kreutzberg, 114 Wis. 530, 537, 90 N. W. 1098, 1101 (1902).

[91] Durkin *v.* Kingston Coal Co., 171 Pa. St. 193, 202, 33 Atl. 237, 238 (1895); Hoxie *v.* New York, etc. R. Co., 82 Conn. 352, 359; 73 Atl. 754, 757 (1909). I am indebted to Professor Munroe Smith for calling my attention to a notable example in the minority report of a committee of the Bar Association of the City of New York upon a proposition for amendment of the state constitution so as to permit the enactment of a Workmen's Compensation Act. The report says: "We must begin by ourselves understanding that the constitutional provisions which are contained in our bill of rights in the state and federal constitutions are moral principles, as weighty in moral authority and as vital to the safety of society as any that have ever been promulgated, not even excepting the golden rule. After that, we must teach the people. We must make *them* understand that constitutional rights are moral rights, and that whatever experiments they may try in modes of social organization, they must never try any experiments which will imperil those moral rights. We must make them understand that once they tamper with the security of those moral rights they will, like Samson, wreck the social structure and be themselves crushed in the ruins. There is no duty resting upon the lawyers of today which is higher than the duty to resist to the uttermost any effort at amendment of our constitutions which shall endanger in the slightest degree the moral principles in the bill of rights, or which shall permit any man's property to be taken under any pretext without due process of law, or which shall extend to any man anything less than the absolutely equal protection of the law." Report of Special Committee . . . to consider the Question of an Amendment to the Constitution of the State of New York Empowering the Legislature to Enact a Workmen's Compensation Law (Dated 27 December, 1911) p. 17.

[92] "A law that restricts the freedom of contract on the part of both the master and servant can not in the end operate to the benefit of either." People *v.* Coler, 166 N. Y. 1, 16, 59 N. E. 716, 721 (1901). See for many other examples the papers referred to *supra*, note 85.

[93] Ehrlich, Soziologie und Jurisprudenz (1906); Kantorowicz, Rechtswissenschaft und Soziologie (1911); Kelsen, Ueber Grenzen zwischen juristischer und soziologischer Methode (1911); Brugeilles, Le droit et la sociologie (1910).

interpretation and application of legal rules, to take more account, and more intelligent account, of the social facts upon which law must proceed and to which it is to be applied.[94] More specifically, they insist upon six points:

(1) The first is study of the actual social effects of legal institutions and legal doctrines. Thus Kantorowicz says:

"I advise one who does not believe this to read a section of the German Civil Code in the following way: Let him ask himself with respect to each statement . . . what harms would social life undergo if instead of this statement the opposite were enacted. And then let him turn to all text-books, commentaries, monographs, and reports of decisions and see how many questions of this sort he will find answered and how many he will find even put. Characteristically, also, statistics upon civil law are almost wholly wanting, so that we can be sure of almost nothing as to the social function of civil law, particularly as to the measure of its realization. For instance, we only know that the Civil Code governs five forms of matrimonial property régime, but we have not the least suggestion in what numerical relation and in what geographical subdivisions the several forms occur now in social life." [95]

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[94] "No glance strays over this Chinese wall into the region of social life for the regulation whereof these precepts were promulgated; that troubles the orthodox jurists as little as the uses which the builders of a machine may chance sometime to make of his formula troubles the pure mathematician." Kantorowicz, Rechtswissenschaft und Soziologie, 5. "So this means only remains: look over the Chinese wall into the region of social life in which it is the task of every rule of law to bring forth some sort of consequences." *Id.* 7. See also Vander Eycken, Méthode positive de l'interprétation, 109 *et seq.*; Holmes, The Path of the Law, 10 HARV. L. REV. 457, 467.

Perhaps the most effective study in this direction has been done in Professor Ehrlich's "Seminar for Living Law." See Ehrlich, Die Erforschung des lebenden Rechts, Schmollers Jahrbuch, xxxv, 129 (1911). With us, a sign of a new tendency to take more account of the social facts involved in application of legal rules may be seen in the opinion of Winslow, C. J., in Borgnis *v.* Falk Co., 133 N. W. 209 (Wis., 1911). Reference should be made also to the well-known briefs of Mr. Brandeis in Muller *v.* State of Oregon, 208 U. S. 412, 28 Sup. Ct. 324 (1908), and Ritchie *v.* Wayman, 244 Ill. 509, 91 N. E. 695 (1910), and to the brief in State *v.* Cramer (Supreme Court of Ohio, Jan. 16, 1912). See Boyd, the Economic and Legal Basis of Compulsory Industrial Insurance for Workmen, 10 Mich. L. Rev. 345.

[95] Rechtswissenschaft und Soziologie, 8. In the United States we are even more backward. Proper statistics of the administration of civil justice, which are a prerequisite of intelligent reform of procedure, are not to be had except for the Municipal Court of Chicago. As to criminal law, see Robinson, History and Organization of Criminal Statistics in the United States (1911); Mayo-Smith, Statistics and Sociology, chap. 12 (1907); Ralston, The Delay in the Execution of Murderers, Paper Read Before the Pennsylvania Bar Association (1911).

(2) The second is sociological study in connection with legal study in preparation for legislation. The accepted scientific method has been to study other legislation analytically. Comparative legislation has been taken to be the best foundation for wise law-making. But it is not enough to compare the laws themselves. It is much more important to study their social operation and the effects which they produce, if any, when put in action.[96]

(3) The third is study of the means of making legal rules effective. This has been neglected almost entirely in the past. We have studied the making of law sedulously. It seems to have been assumed that, when made, law will enforce itself. This is true not only of legislation but also of that more important part of our law which rests in the reports. Almost the whole energy of our judicial system is employed in working out a consistent, logical, minutely precise body of precedents. The important part of our system is not the trial judge who dispenses justice to litigants but the judge of the appellate court who uses the litigation as a means of developing the law; and we judge the system by the output of written opinions and not by the actual results *inter partes* in concrete causes. But the life of the law is in its enforcement. Serious scientific study of how to make our huge annual output of legislation and judicial interpretation effective is imperative.[97]

(4) A means toward the end last considered is a sociological legal history; that is, study not merely of how doctrines have evolved and developed, considered solely as jural materials, but of what social effects the doctrines of the law have produced in the past and how they have produced them.[98] Accordingly Kantorowicz

[96] Legislative reference bureaus are beginning to do this work. See Reinsch, Bestrebungen zur Verbesserung der gesetzgeberischen Tätigkeit, Blätter für verglichende Rechtswissenschaft, viii, 246. Kantorowicz gives as an example: in preparation for housing legislation there should be inquiry as to "how far the statutory law of tenancy is silenced by contracts of leasing." *Id.* 9. See some sensible, practical remarks upon this phase of sociological jurisprudence in Tanon, L'évolution du droit et la conscience sociale, 3 ed., 196–202. An important recent work, largely from this standpoint, is Jethro Brown, The Underlying Principles of Modern Legislation (1912).

[97] See my papers, the Need of a Sociological Jurisprudence, 19 Green Bag 607; Law in Books and Law in Action, 44 Am. L. Rev. 12.

[98] "What method shall we employ in studying juridical phenomena? We shall have to investigate: what juridical phenomena are, their classification, the necessary and sufficient conditions in order that they be obligatory, their generality and their permanence. Comparative law can teach us already as to the comparative generality of a phenomenon. . . . Legal history makes us aware of the comparative permanence

calls for a legal history which shall not deal with rules and doctrines apart from the economic and social history of their time, as if the causes of change in the law were always to be found in the legal phenomena of the past; a legal history that shall not try to show that the law of the past can give us an answer to every question, by systematic deduction, as if it were a system without hiatus and without antinomies.[99] Instead it is to show us how the law of the past grew out of social, economic, and psychological conditions, how it accorded with or accommodated itself to them, and how far we can proceed upon that law as a basis, or in disregard of it, with well-grounded expectations of producing the results desired.[100]

(5) Another point is the importance of reasonable and just solutions of individual causes, too often sacrificed in the immediate past to the attempt to bring about an impossible degree of certainty. A whole literature has grown up in recent years upon this subject. In general the sociological jurists stand for what has been called equitable application of law; that is, they conceive of the legal rule as a general guide to the judge, leading him toward the just result, but insist that within wide limits he should be free to deal with the individual case, so as to meet the demands of justice between the parties and accord with the general reason of ordinary men.[101]

(6) Finally, the end, toward which the foregoing points are but some of the means, is to make effort more effective in achieving the purposes of law.[102]

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of these phenomena. . . . One may seek to verify how far the degree of generality of a juridical phenomenon accords with its degree of permanence." Brugeilles, Le droit et la sociologie, 160.

[99] Rechtswissenschaft und Sociologie, 30–34.

[100] Dicey's Law and Public Opinion in England (1905) is a history of legislation from this standpoint. Compare Wigmore's history of the law of confessions. Evidence, I, § 865.

[101] See some account of this doctrine in my paper, The Enforcement of Law, 20 Green Bag 401 (1908).

Out of the great mass of writing upon this subject in the past ten years, reference may be made to the following: Ehrlich, Freie Rechtsfindung und freie Rechtswissenschaft (1903); Gnæus Flavius (Kantorowicz), Der Kampf um die Rechtswissenschaft (1906); Fuchs, Recht und Wahrheit in unserer heutigen Justiz (1908); Oertmann, Gesetzeszwang und Richterfreiheit (1909); Gmelin, Quousque? Beiträge zur soziologischen Rechtsfindung (1910); Kantorowicz, Rechtswissenschaft und Soziologie, 11 *et seq.* (1911).

[102] "The jurist must study the law teleologically; he must observe how the elements of law turn out in their respective working; whether their operation leads to useful or to harmful consequences, to consequences which accord with culture or to those which

Summarily stated, the sociological jurist pursues a comparative study of legal systems, legal doctrines, and legal institutions as social phenomena, and criticizes them with respect to their relation to social conditions and social progress. Comparing sociological jurists with jurists of the other schools, we may say:

1. They look more to the working of the law than to its abstract content.

2. They regard law as a social institution which may be improved by intelligent human effort, and hold it their duty to discover the best means of furthering and directing such effort.

3. They lay stress upon the social purposes which law subserves rather than upon sanction.

4. They urge that legal precepts are to be regarded more as guides to results which are socially just and less as inflexible molds.

5. Their philosophical views are very diverse. Beginning as positivists, recently they have adhered to some one of the groups of the social philosophical school, from which, indeed, the sociological school, on many essential points, is not easily distinguishable. While Professor Moore tells us that the time has come "in the development of the pragmatic movement for systematic and detailed applications of pragmatic conceptions and methods to specific problems, rather than further discussion of general principles," [103] unhappily discussion of general principles goes on and a pragmatist philosophy of law is yet to come. When it is promulgated it may expect many adherents from the sociological jurists.

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oppose it; to consequences whereby values are appraised justly or unjustly." Kohler, Introduction to Rogge's Methodologische Vorstudien zu einer Kritik des Rechts, viii (1911).

[103] Pragmatism and its Critics, Preface.